

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

MORTIMER EXCELL,

Plaintiff,

9:08-CV-945

vs

BRIAN FISCHER, Commissioner, DOCs; et al,¹

Defendants.

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APPEARANCES:

OF COUNSEL:

MORTIMER EXCELL  
Plaintiff, *pro se*  
96-R-8355  
Elmira Correctional Facility  
Box 500  
Elmira, NY 14902

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State of New York  
Attorney for State Defendants  
Department of Law  
The Capitol  
Albany, New York 12224

ADAM SILVERMAN, ESQ.  
DAVID L. COCHRAN, ESQ.  
Assts. Attorney General

DAVID N. HURD  
United States District Judge

**DECISION and ORDER**

Plaintiff, Mortimer Excell, brought this civil rights action pursuant to 42 U.S.C. § 1983. By Report-Recommendation dated August 25, 2009, the Honorable Randolph F. Treece, United States Magistrate Judge, specifically recommended that the defendants'

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<sup>1</sup> It is noted that the plaintiff has named a total of forty-three (43) defendants in the eighty-eight (88) page complaint.

motion to dismiss (Docket No. 59) be granted in part and denied in part; that the following defendants be dismissed: T. Ramsdell, C. Crossman, Fearchild, D. Uhler, M. Patnode, Lucien LeClaire, Jr., Vonda Johnson, Frenyea, R. Lawrence, S. Tyrell, Lt. Miller, Lashway, Benthley, Knapp, Lucia, Loomis, Ferguson, Poltlos, Brousseau, J.T. Rice, D. Waldron, Quinn, Travers, Pedro Diaz, Robert Woods, Richard Roy, Brian Bengmann, N. Bezio, Steven Racette, Sgt. Rokece, C.O. Green, Ortloff (spelled "Oltloff" on the docket), and Karen Bellamy; and that plaintiff's motion for a preliminary injunction (Docket No. 57) be denied. To clarify his recommendations, the Magistrate Judge specifically stated that his recommendations leave the following claims viable: (1) Excessive force and retaliation against defendants Tamer, M. Orzech, T. Carter, Moak, and Labetz; (2) conspiracy against defendant Tamer, M. Orzech, T. Carter, Moak, Labetz, R. Rock, and H. Warner; (3) violation of plaintiff's First Amendment right to practice religion against M. Orzech; and (4) supervisory liability against Dale Artus and Brian Fischer. The Magistrate Judge further stated that his recommendations leave defendants T. Carter, Tamer, Moak, M. Orzech, Labetz, R. Rock, H. Warner, Dale Artus, and Brian Fischer as remaining defendants should the Report-Recommendation be adopted. In a Clarification Order dated September 9, 2009, Magistrate Judge Treece clarified that it is his recommendation that all of plaintiff's claims against defendant Lester Wright, M.D., be dismissed. The plaintiff has timely filed objections to the Report-Recommendation.

It is noted that the defendant "Labetz, Lt., Clinton Correctional Facility," has never been served. The Magistrate Judge ordered that said defendant not be dismissed from the action as the other unserved defendants will be. The Magistrate Judge directed the Clerk to issue a summons and forward it, along with a copy of the complaint, to the United States

Marshal for service upon defendant Labetz within thirty days of the date of the Report-Recommendation. It appears that the summons and complaint were never issued for service. Therefore, the plaintiff will be granted thirty days from the date of this order within which to serve defendant Labetz. The plaintiff is again warned, that if this defendant is not served within thirty days, the claims against defendant Labetz will be dismissed without further order of this court.

Based upon a careful review of the entire file, including the recommendations of Magistrate Judge Treece, the Clarification Order, and the objections by plaintiff, the Report-Recommendation is accepted and adopted in all respects. See 28 U.S.C. 636(b)(1).

Accordingly, it is

ORDERED that

1. Defendants' motion to dismiss is GRANTED, in part, and DENIED, in part;
2. Defendants T. Ramsdell, C. Crossman, Fearchild, D. Uhler, M. Patnode, Lucien LeClaire, Jr., Vonda Johnson Fenyey, R. Lawrence, S. Tyrell, Lt. Miller, Lashway, Benthley, Paul Knapp, Lucia, Loomis, Ferguson, Poltlos, Brousseau, J.T. Rice, D. Waldron, Quinn, Travers, Pedro Diaz, Robert Woods, Richard Roy, Brian Bengmann, N. Bezio, Steven Racette, Sgt. Rokece, C.O. Green, Ortloff (spelled "Oltloff" on the docket), Karen Bellamy, and Lester Wright, M.D., are DISMISSED from this action;
3. Defendants T. Carter, Tamer, Moak, M. Orzech, Labetz, R. Rock, H. Warner, Dale Artus, and Brian Fischer will remain as defendants;
4. Plaintiff's motion for a Preliminary Injunction is DENIED;

5. The following claims remain in this action:

- a. Excessive force and retaliation against defendants Tamer, M. Orzech, T. Carter, Moak, and Labetz;
- b. Conspiracy against defendant Tamer, M. Orzech, T. Carter, Moak, Labetz, R. Rock, and H. Warner;
- c. Violation of plaintiff's First Amendment right to practice religion against M. Orzech; and
- d. Supervisory liability against Dale Artus and Brian Fischer.

6. The defendant Labetz is not dismissed from this action at this time. The Clerk is directed to issue a summons and forward it, along with a copy of the complaint, to the United States Marshal for service upon defendant Labetz within thirty days of the date of this Order adopting the Report-Recommendation.

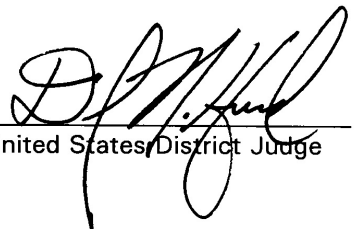
7. If defendant Labetz is not served within thirty days of the date of the order, he will then be DISMISSED without further order of the court.

8. The Clerk is directed to enter judgment against the dismissed defendants, and to make the necessary changes on the docket to reflect the remaining defendants; and

9. The above action is referred to the Honorable Victor Bianchini, Recalled United States Magistrate Judge, for the purposes of mediation. Any further proceedings are stayed pending the completion of mediation.

IT IS SO ORDERED.

Dated: September 23, 2009  
Utica, New York.



United States District Judge